UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-20373-CR-LENARD/TORRES

UNITED STATES OF AMERICA

v.

NARSEAL BATISTE, et al.

Defendants.
_____/

GOVERNMENT'S MEMORANDUM REGARDING
PERMISSIBLE SCOPE OF CASE AGENT TESTIMONY

The United States of America, through undersigned counsel, respectfully submits this memorandum to the Court regarding the admissibility of opinions, inferences and summary testimony by a case agent or other law enforcement witness who is not formally designated as an expert. Simply put:

- Under Fed. R. Evid. 701, a case agent or other witness may offer an opinion or state an inference for the jury, if he can do so based upon his own his training and experience and his perception of facts in the case. *See, e.g., United States v. De La Fe*, 2007 WL 117695 (11th Cir. Jan. 18, 2007) (law enforcement witnesses "can testify 'based upon their particularized knowledge garnered from years of experience within the field'" without being noticed as experts).

- Courts routinely allow case agents to interpret recorded conversations and testify about the meaning of "code" words.

- It does not matter whether the agent's opinion is one that is, or could be, given as well by an expert.

- A case agent may summarize the content of other evidence before the jury.

We address each of these points below.

I. Rule 701 Allows an Agent to Offer an Opinion or State an Inference for the Jury.

A witness does not always have to be designated as an expert in order to state an opinion or draw an inference for the jury. On the contrary, Rule 701 of the Federal Rules of Evidence states that a lay person may testify as to opinions or inferences, so long as they are: "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Rule 701 applies to all witnesses, but has been interpreted expansively in the Eleventh Circuit (more so than elsewhere) to allow opinion testimony by law enforcement officers. The Eleventh Circuit has found repeatedly that, when an agent offers an opinion or inference based upon his perceptions and past experiences in a specific area of criminal activity, that testimony comes squarely within Rule 701, and does not require any kind of pre-trial expert disclosure.

In the *De La Fe* case quoted above, for example, the Eleventh Circuit upheld the admission of the opinion by an agent in a drug prosecution that the defendant's travel from Houston to Miami was along a known drug trafficking route. 2007 WL 117695 at *3. In another recent case, *United States v. Jones*, 2007 WL 582429 (11th Cir. Feb. 27, 2007), the court upheld the admission of opinions by an agent regarding the street value of certain drugs, the use of firearms by persons in the drug trade and whether the quantity of drugs associated with the defendant was consistent with trafficking rather than personal use. *See also United States v. Chambers*, 204 Fed. Appx. 859, 862 (11th Cir. 2005) (agent properly allowed to offer opinions under Rule 701 regarding the significance of drug packaging methods and the possession of firearms by persons in the drug trade); *United States v. Butler*, 102 F.3d 1191, 1199 (11th Cir. 1997) (same). These decisions are not limited to drug cases, either. For example, in *United States v. Myers*, 972 F.2d 1566, 1577-78 (11th Cir. 1992),

the court upheld the admission of opinions by police officers in a civil rights prosecution that a stun gun was responsible for injury marks on the victim's back, and that the defendants used unreasonable force to subdue the victim. The Court emphasized that "a lay witness . . . is not precluded from offering his opinion" about a relevant issue in the case when it is based upon his knowledge and experience. *Id.* at 1578. These cases stand for the proposition that a case agent may offer opinions without being noticed up as an expert so long as the government lays a sufficient foundation under Rule 701.

II. Under Rule 701, an Agent May Offer Opinion Testimony or State Inferences About the Content and Meaning of Recorded Conversations.

A long line of cases from this Circuit allows agents to offer lay opinions or provide context about a defendant's recorded conversations, including the meaning of "code words." In *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001), the defendants unsuccessfully challenged the district court's admission of testimony by some of the agents on the case concerning the use of code words by the defendants. At several points throughout the trial, the district court permitted law enforcement agents who had monitored the telephone wiretaps, as well as the supervisors of those agents, to testify concerning their understanding of the meaning of certain words used by the defendants in the taped conversations. For example, agents testified that when the defendants used the phrases "fifteen year old girl" or "fifty year old grandmother," they were actually referring to fifteen and fifty kilogram quantities of cocaine. The defendants objected, complaining that the testimony was actually expert testimony governed by Federal Rule 702, which should not have been admitted because the prosecution had not laid the proper foundation to qualify the witnesses as experts and because there had been no prior disclosure. The district court found otherwise, determining that the testimony was admissible under Rule 701, and the Eleventh Circuit agreed:

> [Defendants'] position is based on the erroneous assumption . . . that because an expert could provide the type of testimony at issue, a lay witness cannot. Our case law is squarely to the contrary. . . . The district court did not abuse its discretion by permitting agents involved in the case to give opinion testimony based on their perceptions and on their experience as police officers about the meaning of code words employed by the defendants in their intercepted conversations.

Id. at 1008-09.

In *United States v. Awan*, 966 F.2d 1415, 1430 (11th Cir. 1992), the Eleventh Circuit affirmed the district court's admission of testimony by an agent concerning the "meaning and import" of potentially ambiguous statements that were part of tape-recorded conversations with the defendants. The defendants argued that jurors should have been allowed to draw their own conclusions about the meaning of the statements without the influence of the agent's interpretation. The court of appeals rejected that argument, finding that the agent's testimony was based on his perceptions of the conversations and that the testimony could have been helpful to the jury. *Id.* at 1430.

Similarly, in *United States v. Russell*, 703 F.2d 1243 (11th Cir. 1983), the court upheld testimony by an agent who interpreted the defendants' purpose and intent during tape-recorded conversations. The court rejected the argument that the agent "invaded the province of the jury by offering opinion evidence based on the tape recordings which were themselves admitted into evidence." *Id.* at 1248. Indeed, the court concluded that the agent's testimony was not even opinion testimony at all, but rather a "description of facts as he perceived them." *Id. See also United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986) (affirming admission of opinion under Rule 701 that, when defendant stated that he "wanted to make a trip," he was referring to an illegal act).[1]

[1] Some of these decisions pre-date a 2000 amendment to Rule 701, which added subsection (c) to that Rule. However, the Eleventh Circuit has held expressly that, at least with regard to law enforcement officers, the Rule operates just as it did before the amendment. *See Jones*, 2007 WL 582429 at 81 n.2; *Chambers*, 204 Fed. Appx. at 862 n.3; *Tampa Bay Shipbuilding & Repair Co v.*

As these cases show, there is no prohibition on a case agent testifying about the meaning of certain words or phrases in a recorded call, if he has personal knowledge of the underlying evidence and is aware – through his training and experience – that a word or phrase has a particular meaning.

III. It Is Immaterial Whether a Lay Opinion Is One that "Could" Be Given by an Expert.

As *Novaton* makes clear, the admissibility of a lay opinion under Rule 701 does not depend on whether the opinion could, or should, be rendered instead by an expert. 271 F.3d at 1009. Simply because one side, or both, may offer expert testimony about a particular subject does not mean that a lay witness cannot do so as well. *Id.; see also United States v. Hernandez-Bautista*, 2007 WL 293473 (10th Cir. Feb. 2, 2007) (affirming admission of opinion testimony by agent about the nature of vehicle tire tracks and patterns, despite defendants' argument that the existence of cases where expert witnesses opined on such subjects meant that the field was necessarily one of "specialized" expert knowledge and thus outside Rule 701).

IV. A Case Agent May Summarize Other Evidence in the Case.

It is well-settled that a case agent or other government witness may summarize for the jury other admitted evidence in a complex case without implicating the expert rules. In *United States v. Johnson*, 54 F.3d 1150 (5th Cir. 1995), for example, the court upheld the admission of testimony by a non-expert law enforcement witness that summarized prior testimony regarding events and persons in the case. *Id.* at 1162. The court relied upon Fed. R. Evid. 611, and emphasized that the complexity of the charged conspiracy and the large volume of witnesses and other evidence

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Cedar Shipping Co., 320 F.3d 1213, 223 n.17 (11th Cir. 2003).

presented to the jury made the summary testimony appropriate.[2] In *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), the court held plainly that "the Federal Rules of Evidence do not bar use of non-expert summary testimony," and found that "a non-expert summary witness can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial." *Id.* at 1347-48.

Conclusion

For all of the foregoing reasons, the Court should allow government agents in this case to offer opinion and summary testimony consistent with Fed. R. Evid. 701 and 611, including testimony about the contents of these defendants' communications.

Respectfully submitted,

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[2] In relevant part, Rule 611 gives the court the authority to control "the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and] (2) avoid needless consumption of time . . ." Rule 611 is a counterpart to Fed. R. Evid. 1006, which allows the government to summarize, through charts or witnesses, the contents of previously-admitted recordings and documents. *See, e.g., United States v. Richardson*, 233 F.3d 1285, 1294 (11th Cir. 2000) (allowing admission of summary charts that contain assumptions favorable to the government, so long as those assumptions are supported by evidence previously presented to the jury); *United States v. Francis*, 131 F.3d 1452, 1458 (11th Cir. 1997) (affirming admission of written summaries of tape-recorded conversations and testimony about those summaries); *United States v. Atchley*, 699 F.2d 1055, 1056-59 (11th Cir. 1983) (affirming admission of summary of telephone call records).

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on January 17, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Jacqueline Arango
JACQUELINE ARANGO
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